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No. 42

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S.J. Res. 12 — The Flag Protection Amendment

Calendar No. 473

Ordered to be reported favorably by the Judiciary Committee on June 15, 2006, without a written report.

Noteworthy

- By unanimous consent (order #473), the Senate will proceed to the consideration of S.J. Res. 12 on Monday, June 26, at 4:00 p.m., for debate only. A vote on this constitutional amendment is expected later in the week.
- This constitutional amendment would read as follows: “The Congress shall have power to prohibit the physical desecration of the flag of the United States.” Thus, the amendment will not directly ban the desecration of the American flag, but will empower Congress to do so.
- S.J. Res. 12 was reported favorably by the Judiciary Committee with the support of all Republicans plus Senator Dianne Feinstein, a cosponsor of the amendment. No committee report was released, but the committee previously released S. Rept. 108-334.
- The full Senate last voted on this amendment on March 29, 2000, when the measure failed to pass by a vote of 63-37. (Two-thirds support is required for any constitutional amendment.)
- The House has passed a constitutional amendment to protect against desecration of the American flag in *each of the past five Congresses*. Most recently, the House passed H.J. Res. 10 on June 22, 2005, by a vote of 286-130.
- This amendment was drafted in response to two 5-4 decisions of the U.S. Supreme Court — *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 495 U.S. 928 (1990) — in which the Court struck down state and federal bans on flag desecration.
- All 50 states have passed resolutions calling on Congress to pass a flag amendment.

Text of S.J. Res. 12

S.J. Res. 12 proposes an amendment to the U.S. Constitution. If passed by two-thirds of each House of Congress, the amendment then must be ratified by three-fourths of the States within seven years. The amendment itself reads as follows:

“The Congress shall have power to prohibit the physical desecration of the flag of the United States.”

A few aspects of this text are worth noting. *First*, the amendment does not *itself* prohibit flag desecration; instead, it empowers Congress to legislate to that end. *Second*, the amendment is limited to “physical desecration,” and would *not* empower Congress to limit any speech relating to the flag. *Third*, the amendment speaks to desecration of “the flag,” and not mere representations of the flag, artistic or otherwise. Congress will have the power to legislate to ensure that there are no ambiguities in the ultimate laws governing this conduct.

Background

The background for this constitutional amendment is examined in detail in the committee reports prepared by the House and Senate Judiciary Committees, H. Rept. 109-131 and S. Rept. 108-334. This brief section will examine why amendment supporters have pursued a constitutional amendment to address this issue. In short, this flag amendment has been proposed in response to two Supreme Court cases: *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990). Each case is discussed below.

Texas v. Johnson: Flag Desecration Receives Constitutional Protection

In *Johnson*, the Supreme Court ruled that a Texas statute barring the intentional desecration of the American flag was unconstitutional. In that case, a man had burned the flag as part of a protest rally. The Court held that flag desecration was “expressive conduct” subject to First Amendment protections, and that the government’s interests in protecting the flag did not suffice to override those First Amendment concerns. *Johnson*, 491 U.S. at 413-419. The Court, speaking through Justice Brennan,¹ concluded:

We can imagine no more appropriate response to burning a flag than waving one’s own, no better way to counter a flag burner’s message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by — as one witness here did — according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

Johnson, 491 U.S. at 420. Thus, Justice Brennan argued that the flag desecration in question should be respected as speech, and that the best remedy for unpalatable speech is counter-speech.

¹ Although Justice William Brennan wrote for the Court in *Johnson*, it is worthy of note that the other four justices were not necessarily of the same political and jurisprudential background. In fact, the majority included Justices Scalia and Kennedy, along with Justices Brennan, Marshall, and Blackmun. Justice Stevens joined Chief Justice Rehnquist and Justices White and O’Connor in dissent.

Writing in dissent, Chief Justice Rehnquist had harsh words for this “civics lesson” from Justice Brennan:

The Court concludes its opinion with a regrettably patronizing civics lecture, presumably addressed to the Members of both Houses of Congress, the members of the 48 state legislatures that enacted prohibitions against flag burning, and the troops fighting under that flag in Vietnam who objected to its being burned: “The way to preserve the flag’s special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.” Ante, at 419. The Court’s role as the final expositor of the Constitution is well established, but its role as a Platonic guardian admonishing those responsible to public opinion as if they were truant schoolchildren has no similar place in our system of government. The cry of “no taxation without representation” animated those who revolted against the English Crown to found our Nation — the idea that those who submitted to government should have some say as to what kind of laws would be passed. Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people — whether it be murder, embezzlement, pollution, or flag burning.

Johnson, 491 U.S. at 434-435. Justice Stevens dissented separately, arguing that government certainly has the power to regulate the “means” of speech:

The Court is ... quite wrong in blandly asserting that respondent “was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values.” Ante, at 411. Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray-paint — or perhaps convey with a motion picture projector — his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.

Johnson, 491 U.S. at 438-439.

First Congressional Response — a Statute — Also Struck Down as Unconstitutional

Congress responded to the *Johnson* decision by passing the Flag Protection Act of 1989, a federal law that similarly barred desecration of the flag. The next year in *Eichman*, however, the Supreme Court struck down that federal statute, concluding, again, that desecration of the flag is a form of expressive conduct subject to First Amendment protections. *Eichman*, 496 U.S. at 317-319. Justice Brennan, again writing for the Court, dismissed the relevance of popular opinion as to the importance of protecting the flag, explaining, “any suggestion that the Government’s interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment.” *Eichman*, 496 U.S. at 318. The same four justices (Rehnquist, White, Stevens, and O’Connor) dissented once again.

Second Congressional Response: a Constitutional Amendment

Many Senators concluded after *Eichman* that the only way to ensure that the American flag receives protection from desecration would be to enact a constitutional amendment. Congress had already tried to pass a statute, but the Supreme Court's expansive construction of what constitutes "speech" — and refusal to attach constitutional significance to the flag's uniqueness — had made that law ineffective. If no statute would work, then the only options were constitutional. And, although some advocated an amendment that would expressly bar the desecration of the flag, it was ultimately decided that Congress should be given the power to enact appropriate legislation to that end. This grant of power ensures that Congress is able to craft legislation that avoids ambiguities and expressly defines what conduct shall be prohibited.

Why do advocates seek any protection for the flag? That question has been examined repeatedly in hearings before the Senate and House Judiciary Committees in the 101st, 104th, 105th, 106th, 108th, and 109th Congresses. The policy arguments in favor of the amendment center around the flag's profound and unique meaning in American culture. The flag serves as a reminder of the sacrifice of Americans who have fought and died for our freedoms. Its role in the military, and in military funerals, is especially solemn. Extensive testimony was received in those hearings regarding the special nature of the flag, its meaning to Americans and freedom-loving peoples around the globe, and the injury that its desecration causes them. The words of Justice Stevens, dissenting in *Johnson*, sum up much of the underlying rationale:

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for — and our history demonstrates that they are — it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

Johnson, 491 U.S. at 439.

Administration Position

The Administration has yet to release a Statement of Administration Policy (SAP) on S.J. Res. 12, but it released a one-sentence statement of support for H.J. Res. 10 when the House considered and passed that proposed constitutional amendment in June 2005.

Other Views

The primary objections to the flag amendment are discussed in the minority views filed by Judiciary Committee members, Senators Leahy, Kennedy, Kohl, Feingold, Schumer, and Durbin, in S. Rept. 108-344. Those concerns are summarized below.

Flag desecration does not justify a constitutional amendment. Opponents argue that, while flag burning is "reprehensible," it need not be prohibited. In a related vein, they argue

that, because few flags are desecrated every year in America, there is no “epidemic” deserving of a constitutional response. They also offer a view that Article V of the Constitution — the provision that allows for amendment — simply should not be used very often. Supporters of the amendment counter that, if the Constitution is not to be amended when all 50 states demand it, and when public opinion continues to support that change after many years of evaluation, then the amendment clause is a dead letter. The practical result of refusing to amend the Constitution via Article V is that the Supreme Court retains the ability to shape the document to the whims of a 5-4 majority.

The amendment would encourage flag desecration. Opponents argue that, by making flag desecration illegal (which this amendment does not do, but which Congress could do through later legislation), individuals would be *more* likely to engage in this conduct. They argue that efforts to protect the flag simply encourage others to desecrate it.

Existing legal and social sanctions are adequate. Opponents note that many acts of flag desecration are accompanied by other crimes such as theft or vandalism, and that law enforcement has the power today to prosecute those crimes. They also argue that criminalization is not necessary because social sanctions are substantial. On the first point, supporters would note that this claim could be made about many crimes — they tend to occur with other crimes — but that we still want legal sanctions for the activity that society has deemed harmful in and of itself. On the latter point, it is certainly true that social sanctions against flag burning exist, but the same is true of most other forms of crime, and prosecution is still in order.

A statute focused on “incitement to violence” would be adequate. Some opponents say they would support a statute that barred flag desecration when done to incite others to violence. Opponents note that such a statute would miss the point of protecting the flag and its value to the United States.

Flag desecration is “speech” worthy of protection. Many opponents emphasize that the amendment should be rejected because flag desecration *is* expressive conduct, and should be treated in the same way as speech. Those who desecrate the flag *are* trying to send a message of some sort — be it opposition to the United States’s foreign policy, its history, or its political leaders — and are using the flag desecration as a means to broadcast that view. Advocates believe that, because a message is being sent (however odious to many), then that communication should be treated as “speech” under the First Amendment. In essence, these opponents agree with Justice Brennan’s opinions (derided by Chief Justice Rehnquist as “civics lessons”) in *Johnson* and *Eichman* regarding the primacy of protecting anything that could be construed as political speech.

As detailed on page 4 above, opponents respond that nothing in the flag amendment, or any statute barring flag desecration, prohibits any *speech* — just conduct. A potential flag-burner retains the right to express whatever views, political or otherwise, that would otherwise accompany his flag desecration, but he ought not have the right to destroy the flag as a substitute for that speech. The amendment places no restriction on the content of speech, only on the abuse of the national symbol that many Americans fought and died to protect.